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In the Supreme Court of the United States

OCTOBER TERM, 1970

No. _____

AMERICAN ART INDUSTRIES, INC.,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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PETITION FOR WRIT OF CERTIORARI

American Art Industries, Inc. petitions for writ of certiorari to review the Order (A. 1; R. 34)[1] and Supplemental Judgment (A. 1-4; R. 35-37) of the United States Court of Appeals for the Fifth Circuit after remand.

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[1] A — Appendix attached hereto.
R — Certified record accompanying this petition.

OPINIONS BELOW

The Order and Supplemental Judgment, supra, of the Court of Appeals granting the motion of the National Labor Relations Board for enforcement of its order after proceedings pursuant to remand are, as yet, unreported; the Board's Supplemental Decision after remand (R. 5-8) is reported at 179 NLRB No. 162. Prior decisions and orders of the National Labor Relations Board are reported at 166 NLRB No. 169, page 943, and 170 NLRB No. 1670, respectively. The Opinion and Decision of the Court of Appeals for the Fifth Circuit which remanded to require the Board to reconsider in light of *N.L.R.B.* v. *Gissel Packing Company*, 395 U.S. 575 (1969) and *N.L.R.B.* v. *American Cable Car Systems, Inc.*, 414 F.2d 661 (C.A. 5, 1969) is reported as *N.L.R.B.* v. *American Art Industries*, 415 F.2d 1223 (1969).

JURISDICTION

The Judgment of the Court of Appeals (A. 1-4; R. 35-37) was entered on October 8, 1970; the Order (A. 1; R. 34) referred to, supra, was entered on September 9, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1) as implemented by Supreme Court Rule 19.1(b).

QUESTION PRESENTED

Whether enforcement may be refused to an otherwise appropriate bargaining order of the National Labor Relations Board on the ground that the union in whose favor the order ran may have lost its majority status through employee turnover during the period following the commission of the employer's unfair labor practices.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act (61 Stat. 136, 73 Stat. 519, 29 U.S.C. 151 et seq., are as follows:

29 U.S.C.A. §157.

"Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title. July 5, 1935, c.372, §7, 49 Stat.452; June 23, 1947, 3:17 p.m., E.D.T., c.120, Title 1, §101, 61 Stat. 140."

29 U.S.C.A. §158.

"(a) It shall be an unfair labor practice for an employer —

(5) to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title."

29 U.S.C.A. 160(e)

"• • • The findings of the Board as to the facts, if supported by evidence, shall be conclusive" • • • upon the filing of the record with it, the jurisdiction of the court shall be exclusive and its judgment and decree shall be final, except that the *same shall be subject to appropriate review by the Supreme Court of the United States* upon writ of certiorari or certification as provided in Section 1254 of Title 28." (Emphasis added)

STATEMENT OF THE CASE

This case was previously before this Court on the petition of American Art Industries, Inc. for the issuance of a writ of certiorari[2] (No. 1146, October Term 1969) where the petitioner sought review of a decision of the Court of Appeals in 415 F.2d 1223, certiorari denied March 23, 1970, 90 S.Ct. 1122. The underlying facts of company, union and employee conduct and the proceedings before the Labor Board to that time are set out at length in that petition, which the petitioner refers to the attention of the Court and which said petition the petitioner now makes a part hereof by reference as if fully set out herein. Here, however, it is necessary only to relate the proceedings subsequent to remand and subsequent to denial of that petition (No. 1146, October Term 1969). The Supple-

[2]That petition sought review, in part, because of the substantial conflict in the evidence, as found by the Court of Appeals in 415 F.2d 1223 at page 1227, syllabus (5, 6) where the Court recited: "A review of the record demonstrates there was a substantial conflict in the evidence, with the version of the facts presented by the Company's witnesses directly conflicting with the version presented by the Board's witnesses." (p. 11 of that petition adopted here.)

mental Judgment entered October 8, 1970 (A. 1-4; R. 35-37), in paragraph 1 thereof, correctly recites procedurally what happened.

After remand and after the denial of certiorari in No. 1146 (October Term 1969) the Board invited (R. 3) the Respondent, American Art Industries, Inc. to submit a statement of position, which it did. (R. 24-33). The petitioner here, in its Statement of Position, there, among other things, pointed out (R. 28, 29) "that there was a *complete* turnover of American Art Industries', employees," and that "the union no longer represents any of them," and that the Board should not "seek to discipline American Art Industries at the expense of the new employees," citing *Clark's Gamble Corporation* v. *N.L.R.B.*, 407 F.2d 199 (6 Cir. 1969) and Local 57 *International Ladies' Garment Workers' Union* v. *National Labor Relations Board* (C.A. D.C. 1967) 374 F.2d 295,[1] for deterrence alone is not the proper basis for a remedy and the union has no rights except those given it by employees. In support of its statement that there was a complete turnover of employees, the petitioner attached to its Statement of Position, as Exhibit A, the Affidavit of Theodore Foster, president of American Art Industries (A. 5-6; R. 23), reciting the union's admission that there was no longer any membership among any of the employees of American Art

[1]where the Court stated:

"It has been established, however, that the purpose of the Board remedies is to rectify the harm done the injured workers not to provide punitive measures against errant employers. 'The Board to command affirmative action is remedial not punitive.' Republic Steel Corp. v. N.L.R.B., 311 U.S.C. 12, 61 S.Ct. 77, 79 (1940)." The Court went on to say that the Board should not seek to "discipline" the employer at the expense of new employees, commenting that such a remedy is, on its face, arbitrary, and the Board ought not "to rob Peter to punish Paul."

Industries.[4] This turnover of employees was occasioned, not because of any unfair labor practices, but because the employees refused to return to work after numerous invitations so to do. The Board so admits (R. 11) and the Court, in 415 F.2d 1223, at page 1226, finds and recites two unconditional offers to the employees to return to their old jobs.

The petitioner sought of the Board a reopening of the case for the adducing of evidence with regard to the union's majority status in view of the complete turnover of employees and the lack of any present membership, as evidenced by the Affidavit (R. 23). The Board's sole response to this is contained in its Supplemental Judgment requiring a bargaining order (R. 7) which recited: that because of the likelihood of recurring unfair labor practices in the future, "We hold this view, assuming the truth of the Respondent's unproved allegation that the Union no longer represents a majority of the employees," (which the Board footnoted as footnote 6), and added that the unremedied order required reinstatement of the strikers when, in truth and in fact the strikers have at all times refused to return to work in the face of a continuing unconditional offer to them to return, as is recorded. Be that as it may, the Board refused to take testimony in spite of the facts and the decision in *Clark's Gamble*, supra, and the petitioner stands committed to the proposition that there exists a conflict between this case and *Clark's Gamble Corporation* v. *National Labor Relations Board*, 407 F.2d 199 and 422 F.2d 845, plus the fact that the bargaining order is not supported by substantial evidence.

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[4]The petitioner, as soon as humanly possible after receipt of the union's demand for recognition, sought an election by filing a petition therefor, 12-RM-133 (R. 33), which, after the decision of the Board in 166 NLRB No. 65, was, over one year later, denied (R. 31). Of course no election was ever held.

REASONS FOR GRANTING THE WRIT

The decision here sought to be reviewed is in *direct conflict* with *Clark's Gamble Corporation* v. *National Labor Relations Board* (C.A. 6, 1970), 442 F.2d 845.[5] An examination of the question here presented,[6] supra, will reveal that the question is exactly as that submitted by the National Labor Relations Board in its petition for writ of certiorari in *National Labor Relations Board* v. *Clark's Gamble Corporation* (Petition No. 265) in which certiorari was denied by this Court on October 19, 1970, this Court thereby endorsing the conclusion, indirectly if not directly, that a bargaining order will not be enforced when the union in whose favor the order ran may have lost its majority status through employee *turnover* during the period following the commission of the employer's unfair labor practices.[7] Oddly enough, the decision here sought to be reviewed is also in direct conflict with another decision in the same circuit (Fifth) — decided by a panel other than and different from that in the instant case (R. 16) — to-wit: *National Labor Relations Board* v. *American Cable Car Systems, Inc.* (C.A. 5, 1970), 427 F.2d 446, which the Board refers to in its Supplemental Decision (R. 5-8), its

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[5]See also: 407 F.2d 199.

[6]The petitioner here could easily have substituted, in this question, in lieu of the words "may have" the word 'has', thereby strengthening its position, inasmuch as this record establishes a complete turnover because of the refusal of the employees to return to work.

[7]In its position in *Clark's Gamble Corporation* (No. 265; certiorari denied), the Board attempted, in that sought review, to make relevant the subject of procedural delay to which this Court refused to give consideration since, as was stated in the Board's petition, (page 7, 8) citing (quoting) *N.L.R.B.* v. *Katz*, 369 U.S. 736, 738 n. 16 (1962), "inordinate delay in any case is regrettable, but Congress has introduced no time limitation into the Act except that in Section 10(b)." Time interval, therefore, was and is not a factor.

Motion for Enforcement of such decision after remand (R. 2-4), and its Supplemental Brief in Support of its Motion (R. 9-19).

Because the Board is presently seeking a review of *American Cable Car Systems*, supra (Petition No. 737, October Term 1970, presently pending), and because the Board, on numerous occasions, irreverently and irrelevantly refers to *American Cable Car Systems* in the proceedings subsequent to remand by the Fifth Circuit, comment thereupon is in order.

The Board, in view of the Fifth Circuit decision in *American Cable Car Systems*, where the Fifth Circuit held:

> "In making its determination on December 3, 1969, that the Company's 1965 violations of § 8(a)(1) and (3) precluded a fair election and necessitated a bargaining order, *the Board specifically refused to consider evidence offered by the Company that a complete turnover in employees* and the departure of the only management official involved in the unfair labor practices made a free election possible at that time. The Board's refusal to consider these changes occurring in the intervening years was apparently predicated on the opinion of the Ninth Circuit in NLRB v. L. B. Foster Co., 9 Cir. 1969, 418 F.2d 1. In Foster the complaint was made that changes occurring between the Board's original order and the enforcement proceeding made enforcement of the bargaining order inequitable. The court refused to consider those changes and enforced the order based on the Board's original findings. The Foster case, however, is distinguishable because

> although it was decided after Gissel it did not involve a remand in light of that case to the Board for additional findings. In the instant case a different situation obtains. The Board's original findings were inadequate under the teachings of Gissel and the case had to be remanded to the Board for further findings. We think that *on remand the Board should have taken the opportunity to consider the then existing situation at American Cable to determine whether the electoral atmosphere was still so contaminated that a bargaining order was then justified.*" (Emphasis added)

etc., *seemingly* had second thoughts about its interpretation re *National Labor Relations Board* v. *Gissel Packing Co.*, (1969), 395 U.S. 575, 89 S.Ct. 1918, 29 L.Ed. 2d 547, and seemingly, abandoned its position and argument that "in determining whether the employer's unfair labor practices are of such a nature as to preclude a fair election and thus necessitate a bargaining order based on a past card showing of majority status, *the situation must be appraised as of the time of the commission of the unfair labor practices,*" (Emphasis added) and not at the time of the subsequent order (as in *American Cable Car Systems*, supra, and *Clark's Gamble Corporation*, supra, with which this case is in direct conflict for the Board, despite its position on *Gissel* (see also R. 16), in its Supplemental Decision seemingly, but only seemingly, did lip service to *American Cable Car Systems* (for the obvious purpose of circumventing any effect of *American Cable Car Systems* on *Gissel*), in its findings/conclusion in that decision (R. 7) after a recitation that it considered the impact of, and the standard ennunciation in *Gissel* upon this case (R. 3), to-wit:

> "... • • that the coercive effects of respondent's 'continuing serious unfair labor practices,' as well as the demonstrated 'likelihood of recurrence of unfair labor practices in the future . . . render any traditional remedy inadequate assurance of a fair election," and warrant the issuance of a bargaining order as a remedy in the case. Accordingly, the Board reaffirmed its Section 8(a)(5) finding and the bargaining order issued in its original decision and order." (R. 4; R. 7)

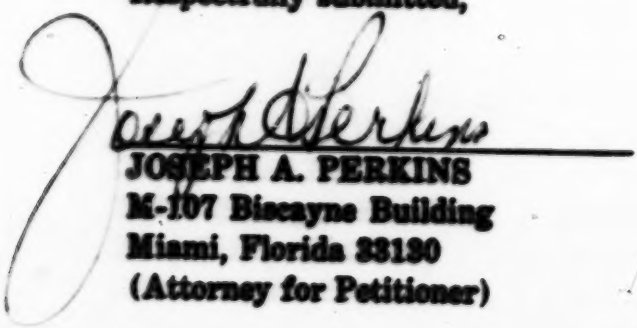
"despite a subsequent loss of union majority" (R. 8). It admittedly (R. 16) bottoms its Supplemental Decision upon the premise that the situation must be appraised at the time of the commission of the unfair labor practices (R. 17) completely disregarding the plain language of *American Cable Car Systems*, supra, and *Clark's Gamble Corporation*, supra, as well as the *Section 7* rights of the new employees; moreover, the Board steadfastly, at all times refused to consider any "turnover" or hold any hearing in that regard.

The decision here cannot be reconciled with *Clark's Gamble Corporation* (C.A. 6, 1970, 442 F.2d 845), nor, for that matter, with *American Cable Car Systems* (C.A. 5, 1970; 427 F.2d 446). *Section 7* rights of new, but now old, employees are ignored. Not unconnected with all of the above is the fact that the Court of Appeals for the Fifth Circuit has so far departed from its own accepted judicial course in *American Cable Car Systems*, as to call for the exercise of this Court's power of supervision particularly in a matter of such great public interest as is presented here.

CONCLUSION

For the foregoing reasons we believe this case is an appropriate one for review, or, better, one for summary reversal. Accordingly, the Court should grant the petition for writ of certiorari, reverse the judgment of the Court of Appeals insofar as it grants enforcement of the Board's bargaining order, and remand the case with direction(s) accordingly.

Respectfully submitted,



JOSEPH A. PERKINS
M-107 Biscayne Building
Miami, Florida 33130
(Attorney for Petitioner)

CERTIFICATE OF SERVICE

I hereby certify that true copies of the foregoing Petition for Writ of Certiorari were mailed to:

ARNOLD ORDMAN, ESQUIRE
General Counsel
National Labor Relations Board
Washington, D.C. 20570

HONORABLE ERWIN N. GRISWOLD
Solicitor General of the United States
Office of the Solicitor General
Washington, D.C.

EARL W. WADSWORTH, *Clerk*
United States Court of Appeals
Fifth Circuit
400 Royal Street
New Orleans, Louisiana

this 25 day of November, 1970.

Joseph A. Perkins

JOSEPH A. PERKINS
Attorney for Petitioner

APPENDIX

[TITLE OMITTED]

On Application for Enforcement of Orders of the National Labor Relations Board

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Before WISDOM, MORGAN, Circuit Judges, and DAVIS*, Court of Claims Judge

BY THE COURT:

IT IS ORDERED that the motion of the National Labor Relations Board for enforcement of its order after proceedings pursuant to remand, filed in the above styled and numbered cause, is hereby GRANTED.

[TITLE OMITTED]

SUPPLEMENTAL JUDGMENT

Before: Wisdom, Morgan, Circuit Judges and Davis*, Court of Claims Judge.

THIS CAUSE came on to be heard upon the application of the National Labor Relations Board for enforcement of its order dated July 31, 1967, in Board Case No. 12-CA-3577 (1-2), directed against American Art Industries, Inc., its officers, agents, successors and assigns. The Court heard argument of respective counsel on May 29,

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*Judge Oscar H. Davis, U.S. Court of Claims, Washington, D.C., sitting by designation.

1969, and having considered the briefs and transcripts of record filed in this cause, handed down its opinion on September 5, 1969, granting in part and denying in part enforcement of the Board's order in Case No. 12-CA-3577 (1-2) and remanding the said case to the Board with respect to the 8(a)(5) violation for further findings consistent with the Court's opinion. Judgment in accordance with that opinion was entered on October 8, 1969. Thereafter, pursuant to remand, the Board on May 22, 1970, filed with this Court its motion for enforcement of its order of July 31, 1967, as reaffirmed by its supplemental decision and order of December 5, 1969, against the above-named Respondent, its officers, agents, successors and assigns. On September 9, 1970, the Court entered an order granting the said motion of the Board for full enforcement of its order in Board Case No. 12-CA-3577 (1-2). In conformity therewith it is hereby

ORDERED AND ADJUDGED by the Court that American Art Industries, Inc., its officers, agents, successors and assigns, with respect to Case No. 12-CA-3577 (1-2), shall:

1. Cease and desist from:

(a) Refusing to bargain with General Sales Drivers and Allied Employees, Local No. 198, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of the employees in the following appropriate unit:

> All production and maintenance employees at the Company's Miami, Florida plant, excluding office clerical employees, guards, and supervisors as defined in the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act:

(a) Upon request, bargain collectively with the above-named Union as the exclusive representative of all employees in the above-described appropriate unit, and embody any understanding reached in a signed agreement.

(b) Post at its plant in Miami, Florida, in both Spanish and in English copies of the attached notice marked "Appendix." Copies of such notice, on forms provided by the Regional Director for Region 12, (Tampa, Florida) after being duly signed by an authorized representative of the Respondent, shall be posted by the Respondent immediately upon receipt thereof, and be maintained for 60 consecutive days thereafter, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to insure that said notices are not altered, defaced, or covered by any other material.

(c) Notify the said Regional Director in writing, within 10 day from the date of this Judgment, what steps the Respondent has taken to comply herewith.

ENTERED: OCT. 8, 1970

APPENDIX

NOTICE TO ALL EMPLOYEES

Pursuant to a judgment of the United States Court of Appeals Enforcing an order of the National Labor Relations Board, and in order to effectuate the policies of the National Labor Relations Act, as amended, we hereby notify our employees that:

> WE WILL BARGAIN upon request with General Sales Drivers and Allied Employees, Local 198, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America, as the exclusive representative of our plant employees.

AMERICAN ART INDUSTRIES, INC.

_____

(Employer)

Dated _____ By _____

(Representative) (Title)

This notice must remain posted for 60 consecutive days from the date of posting, and must not be altered, defaced, or covered by any other material.

If employees have any question concerning this notice or compliance with its provisions, they may communicate directly with the Board's Regional Office, Room 826, Federal Office Building, 51 SW First Avenue, Miami, Florida, 33130, Telephone 350-5391.

AFFIDAVIT

[TITLE OMITTED]

STATE OF FLORIDA)
COUNTY OF DADE) : ss

Before me, the undersigned authority, duly authorized to administer oaths and take acknowledgments in the County and State aforesaid, personally appeared THEODORE FOSTER, who after being duly sworn, deposes and says:

That he is the Ted Foster who is and has at all times material, been President of American Art Industries, Inc.

That at the present time there are approximately fifty-five (55) employees who are performing work in the unit sought to be represented by General Sales Drivers and Allied Employees, Local No. 198, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America; that none of these present employees were employed in the unit sought prior to July 22, 1966; nor, for that matter, were any of these employees employed by the Company in any capacity prior to said date at the time at which a written demand for recognition was made upon the Company by the General Sales Drivers and Allied Employees, Local No. 198, International Brotherhood of Teamsters, Chauffeurs, Warehousemen & Helpers of America.

That at the present time affiant has been informed by counsel, after inquiry of the representative of the Union on September 29, 1969 by affiant's counsel, that the Union

has, as of that date, (to-wit: yesterday) no membership among any of the employees of American Art Industries, Inc.

Further, affiant sayeth naught.

/s/ Theodore Foster

THEODORE FOSTER

Sworn to and subscribed before me
this 30th day of September, 1969.

/s/ Daphne D. Foreman

Notary Public, State of Florida

My commission expires:

Exhibit A

In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 995

AMERICAN ART INDUSTRIES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

This case presents the same basic question involved in *National Labor Relations Board* v. *American Cable Systems, Inc.*, No. 737, 1970 Term, certiorari denied, December 14, 1970. The issue is whether the Board, in determining whether employer unfair labor practices preclude the holding of a fair election and render a bargaining order appropriate, may properly disregard the effect of employee turnover in the bargaining unit which occurred a substantial period after the unfair labor practices took place.[1] In *American*

[1] In *American Cable*, there was also the fact that the management official who had committed the unfair labor practices had subsequently left the company.

413-479—70——1

Cable, one panel of the Fifth Circuit answered this question negatively (427 F. 2d 446); in this case, on different facts, another panel of that court answered it affirmatively (Pet. 5–8; Pet. App. 1–3). The Board believes that, while the court of appeals correctly decided this case, the issue warrants resolution by this Court. However, presumably the same considerations which led the Court to deny the Board's petition in *American Cable* would also lead it to deny the petition here. See also *National Labor Relations Board* v. *Clark's Gamble Corp.*, No. 265, 1970 Term, certiorari denied, October 19, 1970. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

ARNOLD ORDMAN,
General Counsel,
National Labor Relations Board.

DECEMBER 1970.

U. S. GOVERNMENT PRINTING OFFICE: 1970